Supreme Court, U.S.
FILED
MAR 13 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1307

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WINDON THIRD OIL AND GAS DRILLING PARTNERSHIP, et al.,
Plaintiffs-Petitioners,

—v.—

FEDERAL DEPOSIT INSURANCE CORPORATION, et al.,
Defendants,

—and—

PEAT, MARWICK, MITCHELL & CO. and A. MARSHALL SNIPES,
Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION OF DEFENDANTS-RESPONDENTS PEAT, MARWICK, MITCHELL & CO. AND A. MARSHALL SNIPES

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March 13, 1987

Question Presented

Whether the summary judgment dismissal of a Rule 10b-5 claim was correct when: the claim was based on a single telephone conversation with a bystander to securities transactions occurring 11, 14 and 21 months after the phone call, the courts below concluded that the alleged misrepresentations and omissions in the phone conversation were neither material nor relied upon, and those conclusions are not challenged by the petitioners?

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Statute

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Statement

In October 1979 Robert Olson ("Olson") made an unsolicited telephone call to respondent A. Marshall Snipes ("Snipes"), an employee of respondent Peat, Marwick, Mitchell & Co. ("PMM"),[1] to inquire about Clifford Resources, Inc. ("CRI") and its principal, Hal Clifford. Olson had been given Snipes's name as a "personal reference" by CRI. Olson and Snipes had never spoken before

1 PMM is a partnership engaged in the practice of accountancy.

this conversation and did not speak again after it. PMM had not audited or reported upon any financial statement of CRI or made any written or oral representation concerning its financial condition.

Snipes is alleged to have told Olson during that telephone conversation that "he and the other PMM partners" in the firm's Oklahoma City office invested exclusively with CRI, that the PMM partners had invested $250,000 with Clifford personally, that CRI's oil reserves were worth several million dollars, and that CRI's monthly cash flow was approximately $45,000. Petitioners have never claimed that the conversation was part of the purchase or sale of any securities or that it touched upon the value or wisdom of investing in any securities. Nonetheless, petitioners charge that Snipes failed to disclose the following "facts" to Olson: that Snipes had loans from Penn Square Bank; that CRI had cash flow problems; that certain "partners of PMM had obtained loans from Penn Square Bank" supposedly "with the aid" of CRI; that CRI assisted those PMM partners in obtaining the loans "so that Penn Square would continue to make loans to CRI"; and that at some unspecified future time "PMM would gain additional fees from rendering accounting services to Penn Square."

The telephone call took place in October 1979. PMM became the auditor of Penn Square Bank in December 1981, more than two years later. Except for that one telephone call nothing is alleged which connects Snipes and PMM to any petitioner.

The first of the three partnership petitioners, Windon Third, was not formed until September 1, 1980, almost a year after the telephone conversation between Olson and Snipes; the others were formed even later, Windon Fourth on December 3, 1980 and Windon Fifth on July 16, 1981. The offering memorandum for each set forth information relevant to the offering and prominently advised prospective investors:

> "ANY INFORMATION OR REPRESENTATION OTHER THAN AS SET FORTH IN THIS MEMORANDUM HAS NOT BEEN AUTHORIZED AND MUST NOT BE RELIED UPON."

Each offering memorandum set forth the results of CRI's drilling activities in 1978, 1979 and 1980 and CRI's revenues and expenditures for those years and stated that these data were "based on the books and records of [CRI]". None of the offering memoranda mentioned PMM or Snipes or referred in any way to Snipes's alleged comments about CRI in the telephone conversation so many months earlier.

Each offering memorandum informed prospective investors that the particular Windon Partnership offered would be investing in undetermined and unspecified oil and gas properties. Each memorandum disclosed that before forming the first of the petitioner partnerships (Windon Third) the two general partners—Olson and James Weiss—had formed and managed two other partnerships that had invested in oil and gas properties drilled and operated by CRI. By the time they formed Windon Fifth in July 1981, Olson and Weiss had been working with CRI for nearly two years and had acquired interests in 42 wells under development by CRI.

In March 1983 petitioners brought suit against several defendants in the United States District Court for the Western District of Oklahoma. Petitioners did not allege that Snipes's alleged representations and omissions were the cause of any injury. Rather, the sole claims alleged against Snipes and PMM were for aiding and abetting a purported violation of Rule 10b-5 by CRI and for common law fraud. The only basis alleged for these claims was the lone "cold call" to Snipes in 1979.

Initially the district court dismissed petitioners' claims against Snipes and PMM for failure to allege the basic elements of a Rule 10b-5 claim, but granted leave to amend (A-29-

31, 32).[2] So instructed by the court, petitioners added further allegations to their complaint.

The district court then granted summary judgment in favor of Snipes and PMM upon the amended Rule 10b-5 claim and dismissed the common law claim for lack of subject matter jurisdiction (A-19). Accepting petitioners' allegations as true, the court held that the substance of the telephone call was not material (A-14-15), that petitioners' alleged reliance upon the call was not justifiable (A-16-17), and that no conceivable basis for aiding and abetting liability existed because there was no showing of "knowing participation" and "substantial assistance" by PMM and Snipes (A-18).

Bearing in mind this Court's recent articulations of the standard for deciding summary judgment,[3] the United States Court of Appeals for the Tenth Circuit affirmed the district court's findings that materiality and justifiable reliance could not be established as a matter of law. 805 F.2d 342, 347 (A-10). Pointing out that Rule 10b-5 is not a "general liability statute," the court of appeals necessarily ruled that Snipes's comments in his brief conversation with Olson were too remote in time and substance from any purchase or sale of securities to create liability under the statute. *Ibid.*

Argument

Positing a duty that has no application to the facts, petitioners contend that the court of appeals erred in affirming summary judgment in favor of Snipes and PMM. That contention is without merit. The court of appeals and the district court correctly applied settled principles of law, their decisions do not conflict with any rulings of this Court or of the other courts of appeals, and the case does

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2 The appendix to the petition is abbreviated throughout this brief as "A- ."

3 *Celotex Corp.* v. *Catrett*, 106 S. Ct. 2548 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986).

not present a single novel legal issue. Consideration of the case by this Court is unwarranted.[4]

1. This action is based entirely on one telephone call to an individual who was neither a buyer nor a seller in a securities transaction. Petitioners have not alleged or presented a single fact suggesting that the conversation was part of the buying or selling of the Windon partnership units. Nor have they alleged or presented evidence that Snipes made any representation about the value or soundness of investing in the Windon partnerships or about the value or soundness of any arrangements between any Windon partnership and CRI.

Against this background the court of appeals properly found that petitioners had failed to establish both that the alleged misrepresentations or omissions were material and that petitioners justifiably relied upon them. The court of appeals held that "the records, exhibits, and briefs" presented "no factual dispute cognizable within federal securities law." 805 F.2d at 343 (A-2). Accepting petitioners' allegations as true, the court proceeded to test those allegations against "the substantive terrain" of section 10(b), 15 U.S.C. § 78j(b) (1982), and Rule 10b-5, 17 C.F.R. § 240.10b-5 (1986): *i.e.*, "to have legal significance, the allegation must be material, made in connection with the purchase or sale of a security, and be one on which Windon reasonably relied." 805 F.2d at 347 (A-9).

Even after resolving all inferences in petitioners' favor, the court of appeals found that they had failed to establish "the legal element of justifiable reliance." 805 F.2d at 347 (A-10). Pointing to the "brief telephone encounter" that

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4 As an additional ground for granting summary judgment in favor of respondents, the district court held that the amended complaint and supporting documents presented "no conceivable basis for aiding and abetting liability, either as to Peat Marwick . . . or as to Snipes and Peat Marwick jointly" because of petitioners' failure to show "knowing participation" and "substantial assistance" (A-18). Petitioners did not appeal from that ruling to the court of appeals and do not challenge it here.

forms the basis of petitioners' claim, the court found that "the record raises no inference of a relationship between Mr. Olson and Mr. Snipes which would provide a basis for a conclusion that Mr. Olson reasonably relied on his conversation with Mr. Snipes. To insinuate more into the Snipes-Olson communication would transform Rule 10b-5 into a general liability statute." *Ibid.* The district court had reached the identical conclusion, finding that the "disclaimers and caveats" in the offering memoranda "belie plaintiffs' claims that any of its partners or the partnership itself could have relied on Snipes' comments" (A-16-17).

Also unexceptionable is the Tenth Circuit's finding that Snipes's alleged misrepresentations or omissions were "remote and tangential" given the "nonexistence of a relationship" between Olson and Snipes. 805 F.2d at 347 (A-10). That finding implicitly recognizes that Snipes's alleged remarks about CRI were utterly insignificant when viewed against the "total mix" of information available to the petitioners, including CRI's books and records and the prior Windon partnerships' past dealings with CRI. *See TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976).

2. Despite petitioners' contentions to the contrary (petition at 5, 9) the finding of the court of appeals that "the record raises no inference of a relationship" sufficient to support a duty to disclose is neither anomalous nor a divergence from settled law. None of the cases cited by petitioners finds such a duty in a relationship as attenuated, casual and fleeting as the one brief telephone call between Olson and Snipes eleven months before the first petitioner-partnership was formed. For example, *First Virginia Bankshares* v. *Benson*, 559 F.2d 1307 (5th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978), petitioners' main hope, involved discussions between representatives of two lending organizations about the credit-worthiness of a company. The defendant had periodically examined the company's books and knew it was for sale, but misrepresented the company's financial situation to an individual whom de-

fendant's representative personally knew to be the foremost broker of such businesses. Emphasizing that the "inquiry was more than an ordinary credit inquiry" and that defendant had "superior knowledge of inside information" because of its access to the company's books, the court ruled that on those facts a jury could find that defendant had a duty to disclose. 559 F.2d at 1317. Here, by contrast, the petitioners had a longstanding business relationship with CRI and, as the offering memoranda disclosed, had access to CRI's books and records and substantial information about its finances.

Petitioners' other citations of "duty to disclose" language are also wrenched from contexts wholly different from the situation here. *See, e.g., Levinson* v. *Basic Inc.*, 786 F.2d 741 (6th Cir. 1986), *cert. granted*, 55 U.S.L.W. 3569 (U.S. Feb. 23, 1987) (No. 86-279) (material misrepresentations by merger target); *Rudolph* v. *Arthur Andersen & Co.*, 800 F.2d 1040 (11th Cir. 1986), *petition for cert. filed*, 55 U.S.L.W. 3572 (U.S. Feb. 4, 1987) (No. 86-1274) (allegations that auditor permitted publication of its audit reports and statements in a private placement memorandum that it knew to be inaccurate state cause of action under Section 10(b) and Rule 10b-5; court notes that in these circumstances "the accountant's information is obviously superior to that of the investor," *id.* at 1044, but cautions that "we cannot say on the pleadings whether [the auditor] actually had a duty to disclose," *id.* at 1045).[5] The purported conflict between the circuit courts of appeals is illusory.

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5 Petitioners have not cited a single case imposing a duty of disclosure upon the recipient of a casual telephonic inquiry initiated by an informed inquirer. Most of their district court cases involve misrepresentations and omissions by purchasers or sellers of securities or their principals. *See* cases cited in petition at 5-9. In others the statements or omissions bore directly on the value of the securities in question. *Marrero* v. *Banco di Roma (Chicago)*, 487 F. Supp. 568, 575 (E.D. La.

The ruling of the court of appeals in this case is fully consistent with settled law. As this Court has stated, "Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud. When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." *Chiarella* v. *United States*, 445 U.S. 222, 234-35 (1980). No such duty existed here.

1980) (defendant bank allegedly executed a fraudulent filing in violation of Regulation U to facilitate sale of a security); *Whitbread (US) Holdings, Inc.* v. *Baron Philippe de Rothschild*, 630 F. Supp. 972, 975 (S.D.N.Y. 1986) (defendants induced buyer to purchase a distributorship by falsely promising to maintain a business relationship after the purchase).

Conclusion

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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